

Proposed technical amendment:

SECTION _____. G.S. 36C-8-816.1(c) reads as rewritten:

[§ 36C-8-816.1. Trustee's special power to appoint to a second trust.]

(a) For purposes of this section, the following definitions apply:

- (1) Current beneficiary. – A person who is a permissible distributee of trust income or principal.
- (2) Original trust. – A trust established under an irrevocable trust instrument pursuant to the terms of which a trustee has a discretionary power to distribute principal or income of the trust to or for the benefit of one or more current beneficiaries of the trust.
- (3) Second trust. – A trust established under an irrevocable trust instrument, the current beneficiaries of which are one or more of the current beneficiaries of the original trust. The second trust may be a trust created under the same trust instrument as the original trust or under a different trust instrument.

(b) A trustee of an original trust may, without authorization by the court, exercise the discretionary power to distribute principal or income to or for the benefit of one or more current beneficiaries of the original trust by appointing all or part of the principal or income of the original trust subject to the power in favor of a trustee of a second trust. The trustee of the original trust may exercise this power whether or not there is a current need to distribute principal or income under any standard provided in the terms of the original trust. The trustee's special power to appoint trust principal or income in further trust under this section includes the power to create the second trust. The second trust may have a duration that is longer than the duration of the first trust.]

(c) The terms of the second trust shall be subject to all of the following:

- [(1) The beneficiaries of the second trust may include only beneficiaries of the original trust.
- (2) A beneficiary who has only a future beneficial interest, vested or contingent, in the original trust cannot have the future beneficial interest accelerated to a present interest in the second trust.
- (3) The terms of the second trust may not reduce any fixed income, annuity, or unitrust interest of a beneficiary in the assets of the original trust if that interest has come into effect with respect to the beneficiary.
- (4) If any contribution to the original trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code, then the second trust shall not contain any provision that, if included in the original trust, would have prevented the original trust from qualifying for the deduction or that would have reduced the amount of the deduction.
- (5) If contributions to the original trust have been excluded from the gift tax by the application of section 2503(b) and section 2503(c) of the Internal Revenue Code, then the second trust shall provide that the beneficiary's remainder interest in the contributions shall vest and become distributable no later than the date upon which the interest would have vested and become distributable under the terms of the original trust.

- (6) If any beneficiary of the original trust has a power of withdrawal over trust property, then either:
- a. The terms of the second trust must provide a power of withdrawal in the second trust identical to the power of withdrawal in the original trust; or
 - b. Sufficient trust property must remain in the original trust to satisfy the outstanding power of withdrawal.
- (7) If a trustee of an original trust exercises a power to distribute principal or income that is subject to an ascertainable standard by appointing property to a second trust, then the power to distribute income or principal in the second trust must be subject to the same ascertainable standard as in the original trust and must be exercisable in favor of the same current beneficiaries to whom such distribution could be made in the original trust.
- (8) The second trust may confer a power of appointment upon a beneficiary of the original trust to whom or for the benefit of whom the trustee has the power to distribute principal or income of the original trust. The permissible appointees of the power of appointment conferred upon a beneficiary may include persons who are not beneficiaries of the original or second trust. The power of appointment conferred upon a beneficiary shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed.]
- (9) The terms of the second trust shall not contain any provisions that would jeopardize (i) the qualification of a transfer as a direct skip under section 2642(c) of the ~~[Internal Revenue]~~ Internal Revenue Code, (ii) if the first trust owns subchapter S Corporation stock, the election to treat a corporation as a subchapter S Corporation under section 1362 of the Internal Revenue Code, (iii) if the first trust owns an interest in property subject to the minimum distribution rules of section 401(a)(9) of the Internal Revenue Code, a favorable distribution period by shortening the minimum distribution period, or (iv) any other specific tax benefit for which ~~a contribution originally the first trust was clearly designed to qualify and for which the first trust qualified or would have qualified for income, gift, estate, or generation-skipping transfer tax purposes. but for the enactment of this section.~~ In this subdivision, "tax benefit" means a federal or State tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for the benefit from having the settlor considered the owner under sections 671 through 679 of the Internal Revenue Code. Subject to clause (ii) above, the second trust may be a trust as to which the settlor is not considered the owner under sections 671 through 679 of the Internal Revenue Code even if the settlor is considered the owner of the first trust, and the second trust may be a trust as to which the settlor of the first trust is considered the owner under sections 671 through 679 of the Internal Revenue Code, even if the settlor is not considered the owner of the first trust.
- [(10) Notwithstanding any other provision of this section, but subject to the limitations of subdivisions (1), (2), (4), (5), and (9) of this subsection, a trustee

may exercise the power to appoint principal and income under subsection (b) of this section with respect to a disabled beneficiary's interest in the original trust to a second trust that is a supplemental needs trust that does not have (i) an ascertainable standard (or has a different ascertainable standard); (ii) a fixed income, annuity, or unitrust interest in the assets of the original trust; or (iii) a right of withdrawal, if the trustee determines that it would be in the best interest of the disabled beneficiary. For purposes of this subsection, the following apply:

- a. A "supplemental needs trust" means a trust that is a discretionary trust under G.S. 36C-5-504 and relative to the original trust contains either lesser or greater restrictions on the trustee's power to distribute income or principal, and which the trustee believes would, if implemented, allow the disabled beneficiary to receive greater governmental benefits than the disabled beneficiary would receive if the power to appoint principal and income had not been exercised.
- b. "Governmental benefits" means medical assistance, financial aid, or services from any local, State, or federal agency or department.
- c. A "disabled beneficiary" means a current beneficiary of the original trust who the trustee determines has a condition that substantially impairs the beneficiary's ability to provide for his or her own support, care, or custody whether or not the beneficiary has been adjudicated a "disabled person" by any government agency or department.
- d. The second supplemental needs trust shall not be liable to pay or reimburse the State or any government or public agency for medical assistance, financial aid, or services provided to the disabled beneficiary except as provided in the second supplemental needs trust.

(d) A trustee may not exercise the power to appoint principal or income under subsection (b) of this section if the trustee is a beneficiary of the original trust, but the remaining cotrustee or a majority of the remaining cotrustees may act for the trust. If all the trustees are beneficiaries of the original trust, then the court may appoint a special fiduciary with authority to exercise the power to appoint principal or income under subsection (b) of this section.

(e) The exercise of the power to appoint principal or income under subsection (b) of this section:

- (1) Shall be considered the exercise of a power of appointment, other than a power to appoint to the trustee, the trustee's creditors, the trustee's estate, or the creditors of the trustee's estate; and
- (2) Shall be subject to the provisions of G.S. 41-23 specifying the permissible period allowed for the suspension of the power of alienation of the original trust and the time from which that permissible period is computed; and
- (3) Is not prohibited by a spendthrift provision or by a provision in the original trust instrument that prohibits amendment or revocation of the trust.

(f) To effect the exercise of the power to appoint principal or income under subsection (b) of this section, all of the following shall apply:

- (1) The exercise of the power to appoint shall be made by an instrument in writing, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, including the terms of the second trust, and the

effective date of the exercise of the power. The instrument shall be filed with the records of the original trust.

- (2) The trustee shall give written notice to all qualified beneficiaries of the original trust, at least 60 days prior to the effective date of the exercise of the power to appoint, of the trustee's intention to exercise the power. The notice shall include a copy of the instrument described in subdivision (1) of this subsection.
- (3) If all qualified beneficiaries waive the notice period by a signed written instrument delivered to the trustee, the trustee's power to appoint principal or income shall be exercisable after notice is waived by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power.
- (4) The trustee's notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the trustee's power to appoint and bring an action for breach of trust seeking appropriate relief as provided by G.S. 36C-10-1001.

(g) Nothing in this section shall be construed to create or imply a duty of the trustee to exercise the power to distribute principal or income, and no inference of impropriety shall be made as a result of a trustee not exercising the power to appoint principal or income conferred under subsection (b) of this section. Nothing in this section shall be construed to abridge the right of any trustee who has a power to appoint property in further trust that arises under the terms of the original trust or under any other section of this Chapter or under another provision of law or under common law.

(h) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed exercise of the trustee's special power to appoint to a second trust pursuant to subsection (b) of this section. (2009-318, s. 1; 2010-97, s. 5(b); 2013-91, s. 2(d); 2015-205, s. 8.)]

Explanation:

NEW BACKGROUND MATERIAL

From: Melissa C. Bryson [mailto:mcb@ceclaw.com]
Sent: Wednesday, June 01, 2016 2:02 PM
To: Bly Hall (Bill Drafting)
Cc: ljohnson@ssjlaw.net; Bill Culp
Subject: Legislative Committee, Agenda Item 7 Additional Information

Hi Bly,

The phrasing of the amendment, "but for the enactment of this section," is necessary because a legitimate argument exists that the decanting statute itself, that is, the ability to decant from one trust to another trust, is enough to disqualify the trust from specific benefits for which the first trust was clearly designed to qualify.

To bolster the legitimacy of the phrasing of this amendment, the Uniform Decanting Act in its Tax Limitations provision (Section 19), uses similar terminology and provides, "An exercise of the decanting power is subject to the following limitations: (1) If a first trust contains property that qualified, or would have qualified **but for the provisions of this [act] other than this section...**" In addition, the comment to this provision in the Uniform Decanting Act provides, in part:

"If a trustee had the power to decant the trust in a manner that deprived the surviving spouse of the requisite income interest [in a QTIP marital trust], or in the case of a general power of appointment marital trust, the requisite general power of appointment, then arguably the trust would not qualify for the marital deduction from the inception of the trust. Similarly, it is important to ensure that charitable lead trusts and charitable remainder trusts cannot be modified in a way that arguably would prevent them from qualifying for the charitable deduction or that would reduce the amount of that deduction at their inception."

Therefore, to exclude the phrase "but for the enactment of this section," it is possible that the existence of the statutory power to decant, for example, a first trust that otherwise would qualify for the marital deduction, into a second trust, is sufficient to disqualify the first trust from any tax benefit for which it was intended to qualify. So, the phrasing of the amendment, "but for the enactment of this section," is necessary and its importance is highlighted by the inclusion of similar terminology in the Uniform Decanting Act.

Please let me know if the above explanation does not answer your question.

Thank you,
Melissa Bryson

We sent Ms. Bryson's e-mail to the members of the Trusts Drafting Committee, and Tom Wiggins was able to review it and to respond:

Mellissa Bryson's explanation for the language seems reasonable to me to include it as submitted.

Thomas F. Wiggins, JD CPA | Senior Vice President
Manager - Estate, Tax, and Planning Strategy | First Citizens Bank
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336-412-4026 phone
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Old background material:

From: Linda Johnson
Sent: Monday, April 25, 2016 3:47 PM
To: Bly.Hall@ncleg.net
Cc: 'Rebecca Smitherman' <rsmitherman@craigejenkins.com>
Subject: FW: Legislative Committee, Agenda Item 7 Additional Information

Bly,

Below is the additional explanation you requested to support the GSC supporting the change below as a technical correction:

→ The proposed technical correction to the North Carolina decanting statute, 8.816.1(c)(9), serves to eliminate an obvious error of ambiguous and unclear language in the statute by editing the language, “benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes,” so that the language is worded more clearly and so that is easier to understand the intent and purpose of the statute, that the second trust may not disqualify the trust from specific tax benefits for which the first trust was clearly designed to qualify. This technical correction is intended to preserve the tax benefits of the first trust.

“The terms of the second trust shall not contain any provisions that would jeopardize (i) the qualification of a transfer as a direct skip under section 2642(c) of the Code, (ii) if the first trust owns subchapter S Corporation stock, the election to treat a corporation as a subchapter S Corporation under section 1362 of the Code, (iii) if the trust first owns an interest in property subject to the minimum distribution rules of section 401(a)(9) of the Code, a favorable distribution period by shortening the minimum distribution period, or (iv) any other specific tax benefit for which ~~a contribution originally~~ **the first trust was clearly designed to qualify and for which the first trust qualified or would have** qualified for income, gift, estate, or generation-skipping transfer tax purposes. **but for the enactment of this section.** In this subdivision, “tax benefit” means a federal or State tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for the benefit from having the settlor considered the owner under sections 671 through 679 of the Code. Subject to clause (ii) above, the second trust may be a trust as to which the settlor is not considered the owner under sections 671 through 679 of the Code even if the settlor is considered the owner of the first trust, and the second trust may be a trust as to which the settlor of the first trust is considered the owner under sections 671 through 679 of the Code, even if the settlor is not considered the owner of the first trust.”

(This change matches language in the Uniform Decanting Act, Section 19, Paragraph 8.

Thanks,

Linda

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From: Linda Johnson [<mailto:ljohnson@ssjlaw.net>]

Sent: Monday, April 18, 2016 5:14 PM

To: Melissa C. Bryson

Cc: Rebecca Smitherman (rsmitherman@craigejenkins.com); Bill Culp

Subject: Re: Legislative Committee, Agenda Item 7 Additional Information

Thank you!!! I will forward to Gsc. Linda

Sent from my iPhone

On Apr 18, 2016, at 4:49 PM, Melissa C. Bryson <mcb@ceclaw.com> wrote:

Hi Linda & Rebecca,

In regard to Item #7 of the Agenda for the Legislative Committee this Wednesday April 20, 2016, please see the below explanation for the “additional information on GS 36C-8-816(c)(9) to establish for the GSC that the correction is of an obvious error. (Bill Culp).”

The proposed technical correction to the North Carolina decanting statute, 8.816.1(c)(9), serves to eliminate an obvious error of ambiguous and unclear language in the statute by editing the language, “benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes,” so that the language is worded more clearly and so that is easier to understand the intent and purpose of the statute, that the second trust may not disqualify the trust from specific tax benefits for which the first trust was clearly designed to qualify. This technical correction is intended to preserve the tax benefits of the first trust.

The current proposed changes to 8-816.1(c)(9) are highlighted in bold and the proposed parts to strike are crossed out as follows:

“The terms of the second trust shall not contain any provisions that would jeopardize (i) the qualification of a transfer as a direct skip under section 2642(c) of the Code, (ii) if the first trust owns subchapter S Corporation stock, the election to treat a corporation as a subchapter S Corporation under section 1362 of the Code, (iii) if the trust first owns an interest in property subject to the minimum distribution rules of section 401(a)(9) of the Code, a favorable distribution period by shortening the minimum distribution period, or (iv) any other specific tax benefit for which ~~a contribution originally~~ **the first trust was clearly designed to qualify and for which the first trust would have** qualified ~~for income, gift, estate, or generation-skipping transfer tax purposes.~~ **but for the enactment of this section.** In this subdivision, “tax benefit” means a federal or State tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for the benefit from having the settlor considered the owner under sections 671 through 679 of the Code. Subject to clause (ii) above, the second trust may be a trust as to which the settlor is not considered the owner under sections 671 through 679 of the Code even if the settlor is considered the owner of the first trust, and the second trust may be a trust as to which the settlor of the first trust is considered the owner under sections 671 through 679 of the Code, even if the settlor is not considered the owner of the first trust.”

Thank you,

Melissa C. Bryson
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Supplemental Comment to G.S. 36C-8-816.1, regarding the 2015 amendment:

G.S. 36C-8-816.1

Supplemental North Carolina Comments (2015)

Effective October 1, 2015, subsection (b) of this section is amended to add at the end of the subsection the sentence: "The second trust may have a duration that is longer than the duration of the original trust." The purpose of this addition is to clarify and make the statute more specific as to the duration of the second trust. The decanting statutes of several other states contain a similar provision. *E.g.*, Alaska Stat. §13.36.158(b) (2014).



Also effective October 1, 2015, subdivision (c)(9) is added to the section to provide that the terms of the second trust shall not contain any provisions that will jeopardize existing tax elections, including those relating to generation skipping transfer tax planning, subchapter S Corporation stock, retirement benefits and any other tax benefits for which a contribution originally qualified for income or transfer tax purposes. Subdivision (c)(9) also adds a provision that, subject to a subchapter S corporation election, the second trust may be a trust in which the settlor is not considered the owner of the trust for income tax purposes even if considered the owner of the first trust, or if the settlor is not considered the owner of the first trust, the second trust may be a trust in which the settlor is considered the owner of the second trust.

In addition, effective October 1, 2015, subdivision (c)(10) is added to this section to provide that, subject to the specified limitations provided in subsection (c), but notwithstanding the restrictions in subsection (c) on reducing fixed income, changing withdrawal rights and modifying an ascertainable standard of distribution, the trustee may exercise a power to appoint the trust property with respect to the interest of a disabled beneficiary, as defined in subdivision (c)(10)c., in the original trust to a second trust which is a discretionary "supplemental needs trust," as defined in sub-subdivision (c)(10)a. The purpose of these provisions is to allow a trustee to convert a trust in which all or part of the trust's income and principal might be required to be distributed to a disabled beneficiary to a wholly discretionary trust in order to maximize the disabled beneficiary's access to "government benefits" as defined

in sub-subdivision (c)(10)b. Under sub-subdivision (c)(10)d., the second supplemental needs trust does not have to be liable to reimburse a state for governmental benefits provided to the disabled beneficiary except as provided in the second trust. This provision was added to clarify that the second trust does not need to become a first party self-settled trust under 42 U.S.C. 1396p(d)(4)(A) by reason of the decanting.

Section 19 of the Uniform Trust Decanting Act:

SECTION 19. TAX-RELATED LIMITATIONS.

(a) In this section:

(1) “Grantor trust” means a trust as to which a settlor of a first trust is considered the owner under 26 U.S.C. Sections 671 through 677[, as amended,] or 26 U.S.C. Section 679[, as amended].

(2) “Internal Revenue Code” means the United States Internal Revenue Code of 1986[, as amended].

(3) “Nongrantor trust” means a trust that is not a grantor trust.

(4) “Qualified benefits property” means property subject to the minimum distribution requirements of 26 U.S.C. Section 401(a)(9)[, as amended,], and any applicable regulations, or to any similar requirements that refer to 26 U.S.C. Section 401(a)(9) or the regulations.

(b) An exercise of the decanting power is subject to the following limitations:

(1) If a first trust contains property that qualified, or would have qualified but for provisions of this [act] other than this section, for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code or a state gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer

from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

(2) If the first trust contains property that qualified, or would have qualified but for provisions of this [act] other than this section, for a charitable deduction for purposes of the income, gift, or estate tax under the Internal Revenue Code or a state income, gift, estate, or inheritance tax, the second-trust instrument must not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified.

(3) If the first trust contains property that qualified, or would have qualified but for provisions of this [act] other than this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b)[, as amended], the second-trust instrument must not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(b)[, as amended]. If the first trust contains property that qualified, or would have qualified but for provisions of this [act] other than this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b)[, as amended,] by application of 26 U.S.C. Section 2503(c)[,as amended], the second-trust instrument must not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(c)[, as amended].

(4) If the property of the first trust includes shares of stock in an S corporation, as

defined in 26 U.S.C. Section 1361[, as amended,] and the first trust is, or but for provisions of this [act] other than this section would be, a permitted shareholder under any provision of 26 U.S.C. Section 1361[, as amended], an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. Section 1361(c)(2)[, as amended]. If the property of the first trust includes shares of stock in an S corporation and the first trust is, or but for provisions of this [act] other than this section would be, a qualified subchapter-S trust within the meaning of 26 U.S.C. Section 1361(d)[, as amended], the second-trust instrument must not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

(5) If the first trust contains property that qualified, or would have qualified but for provisions of this [act] other than this section, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. Section 2642(c)[, as amended,] the second-trust instrument must not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. Section 2642(c)[, as amended].


(6) If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument may not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. Section 401(a)(9)[, as amended,] and any applicable regulations, or any similar requirements that refer to 26 U.S.C. Section 401(a)(9)[, as amended] or the regulations. If an attempted exercise of the decanting power violates the preceding sentence, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise

of the power and Section 22 applies to the separate share.

(7) If the first trust qualifies as a grantor trust because of the application of 26 U.S.C. Section 672(f)(2)(A)[, as amended,] the second trust may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. Section 672(f)(2)(A)[, as amended].

(8) In this paragraph, “tax benefit” means a federal or state tax deduction, exemption, exclusion, or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to paragraph (9), a second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

(A) the first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

 (B) the transfer of property held by the first trust or the first trust qualified, or but for provisions of this [act] other than this section, would have qualified for the tax benefit.

(9) Subject to paragraph (4):

(A) except as otherwise provided in paragraph (7), the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(B) except as otherwise provided in paragraph (10), the second trust may be a grantor trust, even if the first trust is a nongrantor trust.

(10) An authorized fiduciary may not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

(A) the first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the second trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or

(B) the first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless:

(i) the settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

(ii) the first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

Legislative Note: *In states in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection (a)(1), (2) and (4) and subsection (b)(3) through (7).*

Excerpt from Official Comment to Section 19:

➡ **Catch-all.** Subsection (b)(8) is a catch-all provision intended to preserve any tax benefits not specifically listed in Section 19 for which the first trust qualified if the first-trust instrument expressly indicates an intent to qualify for the tax benefit or is clearly designed to qualify for the tax benefit. Note that subsection (b)(8) does not address any tax benefits for which the trust may qualify in the future. For example, assume that the first trust was a credit shelter trust that was not subject to federal estate tax at the death of the first to die of a married couple because of the decedent’s federal exclusion. Assume that an independent person may make discretionary distributions to the surviving spouse and descendants pursuant to expanded discretion. Also assume that the credit shelter trust was designed so that it would not be included in the surviving spouse’s estate. The authorized fiduciary could decant and the second trust could grant the surviving spouse a general power of appointment that would cause inclusion in the surviving spouse’s estate. Although the credit shelter trust was designed to be excluded from the surviving spouse’s estate, such tax benefit is one that would occur, if at all, in the future at the surviving spouse’s death; it is not a tax benefit claimed in the past. Therefore subsection (b)(8) does not prohibit such a modification. If the settlor’s purposes include saving taxes, and causing inclusion in the spouse’s estate may save more taxes by causing a basis adjustment at the surviving spouse’s death even though the trust assets would then be included in the

surviving spouse's estate, then such a decanting may be appropriate and is not prohibited by subsection (b)(8).